

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 08-02

DATE: December 27, 2007

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Guideline Memorandum concerning BE & K Construction Co., 351 NLRB No. 29 (September 29, 2007)

This memorandum provides guidance for handling charges alleging an unlawful lawsuit under Bill Johnson's Restaurants, Inc. v. NLRB¹ in light of the Board's recent decision on remand from the Supreme Court in BE & K Construction Company.²

1. Background

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find the filing of a since-concluded civil lawsuit to have constituted an unfair labor practice.³ Previously, in Bill Johnson's Restaurants, the Court had articulated different standards for evaluating ongoing and concluded lawsuits.⁴ Specifically, in Bill Johnson's the Court held that the Board may halt the prosecution of any ongoing suit that lacks a reasonable basis in fact or law and was brought for a retaliatory motive.⁵ As to concluded suits, it was the Court's view that if the litigation resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or "otherwise shown to be without merit," the Board could find a violation if the suit was filed with a retaliatory motive.⁶

¹ 461 U.S. 731 (1983).

² 351 NLRB No. 29 (September 29, 2007).

³ 536 U.S. 516, 527 (2002).

⁴ 461 U.S. at 747-749.

⁵ Id. at 748-749.

⁶ Id. at 747, 749.

In BE & K, the Court rejected its earlier view in Bill Johnson's that allowed the Board to find a concluded meritless lawsuit to be unlawful if it had been filed for a retaliatory motive. The Court in BE & K noted that the First Amendment protection of the right to petition the government, includes the right of access to the courts. It held that, for purposes of protecting legitimate petitioning, the proper focus of the inquiry is the reasonableness of the petition from the perspective of the plaintiff at the time the lawsuit was filed. The Court held that the previous standard was overly broad because it would condemn some lawsuits that constituted genuine petitioning protected by the First Amendment.⁷ Thus after BE & K, the Board could no longer rely on the fact that a lawsuit was ultimately unsuccessful, but must determine whether the suit was reasonably based from the outset.⁸

The BE & K Court also considered and rejected the Board's policy of finding retaliatory motive in a concluded reasonably based suit if it attacked protected conduct.⁹ The Court held that this policy would condemn genuine petitioning where a lawsuit was directed at conduct that a plaintiff reasonably believed was unprotected.¹⁰ The Court also explained that inferring a retaliatory motive from evidence of animus would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal."¹¹ In other words, the mere fact that the plaintiff in a suit dislikes the defendant does not strip the plaintiff of the constitutional right to petition to stop conduct it reasonably believes is illegal. The Court majority left open whether some other showing of retaliatory motive -- for example, that the suit would not have been filed "but for" a motive to impose litigation costs on the defendant, regardless of the outcome of the case, in retaliation for protected activity -- could suffice to condemn a reasonably based but unsuccessful suit.¹²

⁷ 536 U.S. at 532.

⁸ Id. at 532-537.

⁹ Id. at 533.

¹⁰ Id.

¹¹ Id. at 534 (emphasis in original).

¹² Id. at 536-537. In the view of two other justices, the decision in BE & K implies that the Court, in an appropriate case, will find that the Board can never find a

2. The Board's decision in BE & K on remand

In its decision on remand in BE & K, a majority of the Board held that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for the lawsuit.¹³

The Board concluded that the Bill Johnson's principles regarding right of access to courts are equally applicable to both completed and ongoing lawsuits.¹⁴ In either case, it stated, declaring a lawsuit to be an unfair labor practice has a chilling effect on the right to petition. Thus the Board concluded that Bill Johnson's no longer warrants lesser protection for reasonably based but unsuccessful completed litigation. Accordingly, it found that, just as with an ongoing lawsuit, a completed suit that was reasonably based cannot constitute an unfair labor practice.¹⁵

In determining whether a lawsuit is reasonably based, the Board explicitly adopted the standard set forth by the Supreme Court in the antitrust context. That is, "a lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'"¹⁶

The Board addressed the question left open by the Court in BE & K as to whether there may be circumstances under which a lawsuit that is reasonably based might nevertheless be considered an unfair labor practice.¹⁷ In the Board's view, it would be "improper" for it to determine the legality of an objectively reasonably based lawsuit based on whether it determines that the plaintiff

reasonably based lawsuit to be unlawful. Id. at 537-538 (Scalia, concurring, joined by Thomas).

¹³ BE & K, 351 NLRB No. 29 (September 29, 2007), slip op. at 1.

¹⁴ Id., slip op. at 7.

¹⁵ Id.

¹⁶ Id. (quoting Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60 (1993)).

¹⁷ Id., slip op. at 8.

had one motive rather than another in bringing the suit.¹⁸ The Board found that in light of the "significant adverse consequences" of a Board determination that an unsuccessful but reasonably based lawsuit is an unfair labor practice, the "risk of liability would reasonably tend to deter prospective plaintiffs from filing even legitimate claims." For that reason, the Board asserted that in order to avoid chilling the fundamental First Amendment right to petition, it must construe the NLRA as prohibiting only lawsuits that are "both objectively and subjectively baseless."¹⁹

To say that a lawsuit is an unfair labor practice only if it is "both objectively *and subjectively* baseless"²⁰ suggests that not all objectively baseless litigation is necessarily an unfair labor practice.²¹ In positing this view, the Board majority does not define "subjectively baseless." It may have been referring to the motive element of "sham" litigation discussed by the Supreme Court in Professional Real Estate Investors, i.e., a litigant's subjective motivation to abuse governmental process for anti-competitive purposes.²² However, the Board did not purport to define what type of motive would make an objectively baseless lawsuit an unfair labor practice, and it is not clear from its decision that the "sham" motive in the antitrust context is the test.

3. Application of the Board's standard for determining whether a lawsuit is reasonably-based

Certain guiding principles for determining whether a lawsuit is reasonably based emerge from the Board's BE & K decision on remand and subsequent cases. In conducting this inquiry, the Board has stated that it is "mindful of the constitutional underpinnings of the Supreme Court's decision in BE & K and of the necessity of avoiding a result that improperly burdens the First Amendment right to petition the government for redress of grievances."²³

¹⁸ Id.

¹⁹ Id.

²⁰ Id., slip op. at 8 (emphasis added).

²¹ See Id., slip op. at 8, n. 53.

²² 508 U.S. at 60-61.

²³ Ray Angelini, Inc., 351 NLRB No. 24 (September 28, 2007).

First, claims that are novel and unsupported by existing precedent may nevertheless be reasonably based if they raise a "reasonable argument for the extension of existing law" or involve an area of law that is not settled.²⁴ The Board has explained that a lawsuit that entails some "tacking into the wind" of adverse precedent may nevertheless be reasonably based,²⁵ noting the Supreme Court's recognition in BE & K of a First Amendment interest in lawsuits that "'promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around.'"²⁶

For example, in BE & K itself, the Board noted that it could not say that the employer's labor and antitrust lawsuit against the union was baseless, because "much of the applicable law was uncertain when the suit was filed."²⁷ Although the circuit court ultimately found against the employer, its conclusion was not "foregone."²⁸ The Board also found the employer's antitrust claims to be reasonably based because its theory, even though novel and unsupported by established precedent, raised a reasonable argument for the extension of existing law.²⁹ Thus, although the Board considered itself bound by the Supreme Court's conclusion that the lawsuit was reasonably based, its own analysis also led it to the same conclusion.³⁰

Second, the Board's inquiry into factual or legal claims or theories as part of its "reasonably based" analysis is generally limited to whether they are "frivolous" or "plainly foreclosed."³¹ The Board has

²⁴ See, e.g., BE & K, 351 NLRB No. 29, slip op. at 10.

²⁵ Children's Hospital Oakland, 351 NLRB No. 36, slip op. at 3 (September 29, 2007).

²⁶ Id., quoting BE & K, 536 U.S. at 532 and citing Bill Johnson's, 461 U.S. at 747 (holding that the Board should "stay its hand" unless "the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous.").

²⁷ BE & K, 351 NLRB No. 29, slip op. at 9.

²⁸ Id., slip op. at 10.

²⁹ Id.

³⁰ Id., slip op. at 9.

³¹ See, e.g., BE & K, where the Board held that although the employer's Section 303 claims were ultimately unsuccessful,

indicated that it will continue to be guided by the Supreme Court's discussion in Bill Johnson's of the reasonable basis inquiry in the context of ongoing suits.³² There, the Court ruled that while the Board's inquiry need not be limited to the bare pleadings, the Board cannot make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.³³ Further, the Bill Johnson's Court stated that just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."³⁴

Third, as under Bill Johnson's, survival of a motion for summary judgment generally indicates that a lawsuit should be deemed reasonably based. For example, in Ray Angelini, the Board found that because the district court denied the union's motion for summary judgment, the Board must infer that the court had concluded that the complaint stated a claim upon which relief could be granted and that disputed issues of material fact existed precluding judgment as a matter of law in the union's favor.³⁵ Although the court ultimately dismissed the lawsuit after concluding that the union had not entered into any sort of agreement with the city to deprive the respondent of city contracts as alleged, the Board recognized that if the court had resolved the dispute as to that material fact the other way, the outcome of the lawsuit might have been different. The Board concluded, therefore, that it could not say that the respondent could not reasonably have expected to succeed on the merits, and that its claims were certainly not "plainly foreclosed as a matter of law or ... otherwise frivolous."³⁶

Finally, a lawsuit can be considered reasonably based even where it is dismissed on summary judgment,

its theory was not "frivolous" and thus could not be considered baseless. Slip op. at 10.

³² See, e.g., Ray Angelini, 351 NLRB No. 24, slip op. at 3.

³³ 461 U.S. at 744-746. See also Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960, 963 (2000).

³⁴ 461 U.S. at 746-747.

³⁵ 351 NLRB No. 24, slip op. at 4.

³⁶ Id.

particularly if it involves an area of the law that is unsettled. In Children's Hospital Oakland, the employer had filed a Section 301 lawsuit seeking monetary damages and injunctive and declaratory relief, alleging that the union's threatened sympathy strike was a breach of the parties' no-strike clause.³⁷ The district court granted the union's motion for summary judgment and dismissed the lawsuit, rejecting the employer's argument that the interpretation of the parties' no-strike clause should be governed by ordinary contract-law principles and not the "clear and unmistakable waiver" standard. Based on the relevant bargaining history and past practice, the court found that no reasonable trier of fact could conclude that the no-strike clause represented a clear and unmistakable waiver of sympathy-strike rights. The Ninth Circuit affirmed the decision.³⁸

In considering whether the employer's lawsuit in Children's Hospital violated Section 8(a)(1), the Board concluded that the employer's lawsuit was reasonably based. The Board found that the employer could reasonably take the position that the union's waiver of its own right to promote a sympathy strike need not be clear and unmistakable, as it relied on several cases recognizing a distinction between a union's waiver of its own right to promote sympathy strikes and an individual employee's right to strike.³⁹ The Board noted that although both the district and appellate court rejected the employer's theory as inconsistent with relevant precedents, the Ninth Circuit acknowledged that those precedents were "not on all fours" with the case before it, and that the employer's proffered distinction between the rights of unions and those of employees is not foreign to labor law.⁴⁰ Similarly, the Board concluded that it was reasonable for the employer to contend that the no-strike clause at issue prohibited sympathy strikes even under a "clear and unmistakable waiver standard."⁴¹ In making this contention, the employer relied on the Board's use of a rebuttable presumption that a broad no-strike clause covers sympathy strikes. The Board noted that at the time the employer brought its lawsuit, relevant circuit precedent was unsettled

³⁷ 351 NLRB No. 36, slip op. at 2.

³⁸ Id.

³⁹ Id., slip op. at 3.

⁴⁰ Id.

⁴¹ Id., slip op. at 4.

concerning this presumption, and that the employer could reasonably argue for application of that presumption.⁴²

4. Processing of cases alleging that a lawsuit is an unfair labor practice

When a Region receives a charge alleging that a lawsuit is unlawful, it should initially investigate whether the suit is reasonably based.⁴³ If the Region concludes that the suit is reasonably based, it should dismiss the charge, absent withdrawal. If the Region determines that the lawsuit is baseless, it should fully investigate the evidence that the suit was brought with a retaliatory motive. This might include, for example, evidence that the baseless lawsuit itself attacked protected activity, or evidence of motive showing a direct causal connection between the protected activity and the filing of the lawsuit. Similarly, evidence might show that the suit was filed only to "impose the costs of the litigation process, regardless of the outcome," or otherwise as an abuse of process, in retaliation for protected activity. The Region should then submit the case to the Division of Advice with a reasoned analysis supporting its conclusion as to why the lawsuit is baseless and its recommendation on the sufficiency of the evidence of retaliatory motive.⁴⁴

⁴² Id. See also Professional Real Estate Investors, 508 U.S. at 65 ("even though it did not survive PRE's motion for summary judgment, Columbia's copyright action was arguably 'warranted by existing law' or at the very least was based on an objectively 'good faith argument for the extension, modification, or reversal of existing law'"), citing Fed. Rule Civ. Proc. 11. The Supreme Court in that case noted that even in the absence of supporting authority, Columbia "would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success." Id.

⁴³ Regions must investigate and fully analyze the theories of the case and the parties' factual contentions in order to properly determine whether the lawsuit was reasonably based.

⁴⁴ As discussed above, it is unclear what type of motive or evidence of motive would suffice for an objectively baseless lawsuit to be found to be an unfair labor practice.

Finally, Regions should also submit to Advice all cases alleging that a lawsuit is preempted or was filed with an unlawful objective as discussed in footnote 5 of Bill Johnson's. The Supreme Court explained there that its reasonable basis/retaliatory motive analysis in the body of the decision did not govern the Board's power to enjoin these types of suits.⁴⁵ It is unclear, however, how, if at all, the subsequent analysis of the Supreme Court or the Board in BE & K applies to these types of suits.

/s/
R.M.

Release to the Public

Further, by this Guideline Memorandum, Section C.2 of Memorandum GC 07-11, covering mandatory submissions to Advice, is revised.

⁴⁵ Bill Johnson's, 461 U.S. at 737 n. 5. See, e.g., Manno Electric, 321 NLRB 278, 298 (1996) (preempted lawsuit); Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (illegal objective).